

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 13**

**SEARS, ROEBUCK AND CO.**

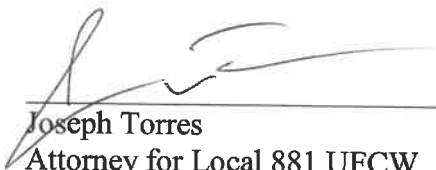
**And**

**Case No. 13-CA-191829**

**LOCAL 881 UNITED FOOD AND COMMERCIAL  
WORKERS**

**LOCAL 881 UFCW'S BRIEF IN SUPPORT OF CROSS EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGES DECISION AND ORDER**

Respectfully submitted,



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Pursuant to Section 102.46 and the Board's Rules and Regulations, Series 8, as amended, Local 881 United Food and Commercial Workers ("Local 881") submits this Brief in support of Cross Exceptions to the Administrative Law Judge's Decision and Order dated, August 17, 2018. In support of its Exceptions, Local 881 hereby adopts and incorporates by reference the findings of fact, arguments, positions, and conclusions set forth in the Counsel for the General Counsel's Brief in Support of Cross Exceptions to the Administrative Law Judge's Decision and Order, as if fully set forth herein (The Counsel for The General Counsel's Brief is attached hereto as Exhibit A).

Dated: October 29, 2018

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "J. Torres", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of October, 2018, a copy of the **LOCAL 881 UFCW'S BRIEF IN SUPPORT OF CROSS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER** was filed electronically with the Board's E-Filing System and also in the manner indicated upon the following parties of record and their counsel:

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**COUNSEL FOR THE GENERAL COUNSEL'S  
BRIEF IN SUPPORT OF CROSS EXCEPTIONS TO THE ADMINISTRATIVE LAW  
JUDGE'S DECISION AND ORDER**

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel submits this Brief in Support of Cross Exceptions to the Administrative Law Judge's Decision and Order dated August 17, 2018.

### **I. Introduction**

On August 17, 2017, Administrative Law Judge Kimberly Sorg-Graves correctly found that Respondent violated Section 8(a)(5) and (1) of the Act when it relied on a decertification petition signed within the certification year in withdrawing recognition from the Union after the certification year expired.

General Counsel files these cross exceptions to the ALJ's failure to find that Respondent further violated the Act by providing employee Barbara Gregory with a decertification petition form in response to her raising concerns about her autistic co-workers being confused by the Union. Specifically, General Counsel excepts to the following: (1) the ALJ's decision not to apply the holding in *Craftool Mfg. Co.*, 229 NLRB 634, 637 (1977) as controlling to find that Respondent violated the Act by providing employee Barbara Gregory with a decertification petition in violation of Section 8(a)(1) but instead erroneously relying upon *Ernst Home Centers*, 308 NLRB 848 (1992) and *Bridgestone/Firestone, Inc.*, 335 NLRB 941 (2001) in support of her erroneous conclusion (ALJD pg. 10 lines 9-11, pg. 11 lines 21-28 ); (2) to the ALJ's finding that Harris's discussions with Gregory concerning how to exclude certain employees from union representation and the providing of a decertification petition form in response to Barbara Gregory's questions constituted no more than ministerial aid: (ALJD 11 lines 21-25); (3) to the ALJ's finding that Gregory had a predetermined goal when she walked into Harris's office and Harris provided her with information to reach that goal. (ALJD 11 lines 14-19); (4) to the ALJ's failure to find that Respondent did not violate Section 8(a)(1) of the Act by soliciting,

supporting, or assisting in the initiation and signing of a decertification petition or by providing a copy of the decertification petition to Ms. Gregory. (ALJD 11 lines 25-28); (5) to the ALJ's failure to find Respondent's withdrawal of recognition was unlawful because the petition was tainted by Respondent's support and assistance.

## **II. Legal Analysis:**

Contrary to the ALJ's decision, General Counsel contends that by providing employee Barbara Gregory with a decertification petition which Ms. Gregory neither explicitly nor implicitly requested Respondent "suggested a precise course of action which clearly indicated Respondent's sponsorship and support" of an unlawfully tainted petition. *Craftool Mfg. Co.*, 229 NLRBG 634, 637 (1977). It is the contention of the General Counsel that the holding in *Craftool* is controlling and that Respondent provided more than ministerial aid to Gregory when Respondent's Store Manager, Anthony Harris, provided her with a decertification petition which she explicitly did not request.

### **A. The ALJ erred in failing to find *Craftool* controlling.**

In her decision, the ALJ incorrectly declined to find *Craftool, Id.*, controlling, despite correctly acknowledging the significant similarities between the employer's unlawful assistance in that case and Respondent's actions in the instant matter. (ALJD 9) Instead, the ALJ erroneously relied upon *Ernst Home Centers*, 308 NLRB 848 (1992); and *Bridgestone/Firestone, Inc.*, 335 NLRB 941 (2001); to equate Gregory's concerns about her autistic co-workers confusion regarding the union with the ALJ's unsubstantiated conclusion that this concern constituted a "predetermined goal" or "objective" to somehow rid the entire unit of its bargaining representative and thus, Respondent's provision of a captioned decertification petition in response did not constitute a violation of the Act. The ALJ reached this erroneous conclusion

despite correctly finding that the “record did not reflect what these employees’ actually wanted at the time or whether they had fully formed any conclusions.”<sup>1</sup> (ALJD 11) The ALJ’s inconsistent and unsupported conclusions must therefore be overruled.

In *Craftool*, 229 NLRB 634, 637 (1977), the Board found the employer’s unlawful actions constituted more than ministerial aid when the manager read a statement suggesting the desirability of circulating a decertification petition to employees who had expressed some dissatisfaction with their union; suggested the language for the petition; directed employees to return the petitions to him; failed to fully inform employees of their legal rights, including that the union’s majority was presumed for 1 year; and allowed employees to circulate the petition on work time. *Craftool* at 636-637. (ALJD 9)

Like *Craftool*, in the instant case, Respondent not only suggested language for the decertification petition but actually prepared the petition with decertification language and provided the petition to Gregory who neither implicitly nor explicitly raised the issue of decertification. Moreover, as the ALJ correctly found, Respondent provided Gregory with the decertification petition with no explanation of employee rights, including the right to an insulated period to effectuate their choice of a collective-bargaining representative during the certification year. (ALJD p. 10, lines 1-2) Also, as in *Craftool*, Gregory was allowed to circulate the petition on work time. Significantly, unlike in *Craftool* wherein employees had expressed some actual dissatisfaction with the Union, neither Gregory nor any other employee in the instant case expressed such sentiment prior to Respondent’s unsolicited provision of the petition.

Specifically, Gregory’s testimony which was credited by the ALJ was as follows:

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<sup>1</sup> The General Counsel excepts to the ALJ’s unsubstantiated conclusion that Gregory had a “predetermined goal” when she spoke to Harris. (ALJD 11; Tr. 65) To the contrary, Gregory credibly testified she had no idea that she could decertify the Union PRIOR to being provided the decertification petition by Respondent. (ALJD 4, 5, 6, 7, 10; Tr. 65) The ALJ’s inconsistent characterization to the contrary must therefore be overruled.

"I asked him if there was anything that the company could do to protect three of the associates that I worked with. They're autistic, and they get very confused. If they could just be eliminated with anything to do with the union." (ALJD 3; Tr. 36.)

Gregory made a very specific request limited to her concern about how to protect three autistic co-workers from getting "confused" with issues involving the Union. She did not ask for, nor even contemplate, information regarding a wholesale decertification of the Union. (ALJD 6; Tr. 36, 65, 136) Significantly, the ALJ credited Gregory's testimony with respect to the fact that she did not know that she could decertify the Union before reading the form she retrieved from Harris's desk which he had left for her. (ALJD 4, 5, 6, 7, 10; Tr. 65) But in response to Gregory's concern of freeing three employees from their confusion about the Union, Respondent gave her more than she asked for—a decertification petition to end the collective-bargaining representation of *all* unit employees. By providing Gregory with a completed decertification petition, Respondent "suggested a precise course of action which clearly indicated Respondent's sponsorship and support" of an unlawfully tainted petition, and impliedly suggested that the only way to remove the three autistic employees from Union discussions was to decertify. Thus, Respondent, in the instant case, clearly provided more than ministerial aid. *Craftool* at 637. Accordingly, the ALJ's failure to find that Respondent unlawfully solicited, supported, and assisted in the initiation and signing of a decertification petition or by providing a copy of the decertification petition to Gregory in violation of Section 8(a)(1) of the Act was erroneous and must be overturned.

**B. The ALJ erred in applying the holdings *Ernst Home Centers* and *Bridgestone/Firestone* to the instant case as the facts are clearly distinguishable and therefore inapplicable.**

In concluding that Respondent's provision of the decertification petition to Gregory in response to her concerns regarding her co-workers constituted no more than ministerial aid, the



ALJ relied upon *Ernst Home Centers* 308 NLRB 848 (1992); and *Bridgestone/Firestone*, 335 NLRB 941 (2001) in which the Board found that the employer's provision of a copy of or language for a decertification petition constituted only ministerial aid, even though the employees did not specifically ask for a decertification petition or to rid the entire unit of union representation. In the instant case, as the ALJ correctly noted, in both *Ernst Home Centers* and *Bridgestone/Firestone* individual employees initially sought information from their employers about how they could individually avoid or get out of the union. *Ernst Home Centers*, supra at 848; *Bridgestone/Firestone*, supra at 941-942. (ALJD pg. 11, lines 1-7) Thus, while the employee in *Ernst Home Centers* initially asked management for information "about how to avoid joining the union," after the managers told the employee they could not assist her in anyway and directed the employee to contact the NLRB for information, the inquiring employee persisted and specifically requested some "verbiage" for a petition. *Id.* Only after the employee specifically requested "verbiage" for a petition did management advise her to contact her store manager to obtain the appropriate language for a decertification petition. *Ernst Home Centers*, 308 NLRB at 848. Thus, the employee in *Ernst Home Centers* clearly took an active role in seeking out the decertification information she was requesting even going so far as to seek out a second manager to obtain specific information about a decertification petition. Under these circumstances, the Board in *Ernst Home Centers* found the evidence therein demonstrated that the employer was simply replying to the employee's request for petition language. *Id.* Therefore, the Board found there was no violation of the Act. It is clear the inquiring employee in *Ernst Home Centers* had a predetermined goal when she repeatedly requested information from various managers about how she could avoid joining the union. This stands in stark contrast to the facts of the instant case.

In the instant case, Gregory made a single inquiry regarding her concerns about how to assist her co-workers. Significantly, she did not seek information about decertifying the Union in any way, shape or form. Importantly, the ALJ credited Gregory's testimony that she did not know she could decertify the Union until after she received the petition from Harris. (ALJD 4, 6, 10; Tr. 65) Despite this finding, the ALJ erroneously conflated Gregory's concern for her co-workers with the explicit statements about "avoiding the union" and repeated actions of the single employee in *Ernst Home Centers* who sought assistance from management regarding verbiage for a decertification petition to find that Respondent's actions in the instant case were merely ministerial. Clearly the facts of the instant case, being so readily distinguishable from those of *Ernst Home Centers*, renders that case inapplicable.

The ALJ's reliance on *Bridgestone/Firestone, Inc.*, 335 NLRB 941 (2001) is similarly misplaced. In *Bridgestone/Firestone*, a newly transferred employee who had not previously belonged to the union and was under pressure to pay dues to the union, asked the employer's manager "if there was any way that he could get out of being the union." *Id.* at 941. The employee further elaborated that he had "never been in the union before" and "figures he just keep it like that." *Id.* Thus, the Board in *Bridgestone/Firestone* found that a fair interpretation of the employee's request was that he wished to continue in the status that he enjoyed before he transferred, specifically, without union representation and without being obligated to pay dues. This employee's request was also very precise. The employee clearly did not want to be a union member and requested specific information on how to remain a non-union member and to continue not to pay union fees. The Board reasoned that the employee's request only logically meant that he wanted to avoid both membership in the union and representation by the union. Thus, the Board concluded it was not unlawful for the employer to provide the employee with

written language to affect his particular wishes.<sup>2</sup> *Id.* at 941. The Board noted, the employee's "clear and unambiguous testimony does not support a finding that his choice was influenced by anyone's preference except his own, or that his initiation of the decertification petition was other than voluntary." *Id.* at 942.

Unlike the employee in *Bridgestone/Firestone*, Gregory did not ask to be free of union representation as she credibly testified she did not know that was an option. (ALJD 4, 10; Tr. 65, 136) Rather, she sought information for co-workers who were confused by the concept of unionization in general. (Tr. 36, 55) Moreover, unlike the employee in *Bridgestone/Firestone*, Gregory's circulation of the decertification petition was clearly influenced by Respondent's unsolicited provision of that petition inasmuch as Gregory "had no idea that she could decertify the Union prior to being provided the decertification petition by Respondent." (ALJD 4, 5, 6, 7, 10; Tr. 65) Simply put, there is no evidence to demonstrate that Gregory had any intent to decertify the Union prior to speaking to Harris. Because, *Bridgestone/Firestone*, supra, is readily distinguishable from the instant matter, it too fails to provide a legitimate basis for the ALJ's erroneous conclusion that Respondent's actions in providing the unsolicited decertification petition to Gregory did not violate the Act. The ALJ's conclusion must, therefore, be overturned.

**C. The ALJ erred by failing to find that Respondent's withdrawal of recognition based upon the decertification petition tainted by Respondent's conduct violated Section 8(a)(5) of the Act.**

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<sup>2</sup> While the employee in *Bridgestone/Firestone* could have avoided union membership by becoming a dues objector, that would not have removed him from union representation, and he still would have been obligated as a financial core member. The only way to accomplish his goals was to decertify the unit. By contrast, here Gregory only asked to avoid confusing three employees; there was no request to remove them entirely from Union membership or dues obligations.

Because the ALJ improperly failed to find Respondent unlawfully solicited, supported, and assisted in the initiation and signing of the decertification petition herein, and/or by providing a copy of the decertification petition to Gregory in violation of Section 8(a)(1) of the Act as set forth above, she did not reach the necessary conclusion flowing from such finding that Respondent's subsequent withdrawal of recognition based upon the decertification petition tainted by Respondent's conduct further violated Section 8(a)(5) of the Act. Accordingly, Counsel for the General Counsel excepts to the ALJ's omission as follows.

It is well established that an employer may not solicit, support, or assist in the initiation, signing, or filing of an employee decertification petition. See *Placke Toyota, Inc.*, 215 NLRB 395 (1974). As discussed above, the Respondent's actions in providing Gregory with the decertification Gregory neither contemplated, nor requested went beyond lawful ministerial aid. Therefore, Respondent's subsequent withdrawal of recognition of the Union based solely in reliance on the unlawfully tainted decertification petition it provided to Gregory constituted a clear violation Section 8(a)(5) of the Act. *Craftool*, 637-638. As the Respondent's withdrawal of recognition is derived from its 8(a)(1) violation, these violations are inextricably linked. While the ALJ correctly found that the withdrawal of recognition was unlawful because it was premised on signatures on the decertification petition that were collected during the certification year (ALJD 13), she failed to find that the taint of the petition also independently rendered unlawful Respondent's withdrawal of recognition. For these reasons, the Board should also find the Respondent violated the Act when it withdrew recognition from the Union based upon the tainted decertification petition it instigated.

#### **CONCLUSION AND REMEDY**

Based upon the foregoing, Counsel for the General Counsel respectfully requests that the Board sustain the General Counsel's Cross Exceptions to the Administrative Law Judge's Decision, find that Respondent unlawfully assisted in the preparation and distribution of a decertification petition and withdrew recognition based on that tainted petition, and modify the ALJ's recommended Conclusions of Law, Order, and Notice accordingly.

Dated: October 29, 2018 at Chicago, Illinois.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Vivian Perez Robles", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of October, 2018 a copy of the **COUNSEL FOR THE GENERAL COUNSEL'S CROSS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER** was filed electronically with the Board's E-Filing System and also in the manner indicated upon the following parties of record and their counsel:

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